

## MEMORANDUM OF LAW

DATE: March 4, 1994

TO: Larry Gardner, Labor Relations Manager

FROM: City Attorney

SUBJECT: Compensation for City Employees Performing Non-City Services

### BACKGROUND

By memorandum dated January 14, 1994, Assistant City Auditor and Comptroller Joe Lozano requested that you provide him with information concerning the legal authority that allows paying the salaries of AFSCME Local 127 ("Local 127") president Stan Robinson and Derrick Mitchell, or other City employees like Mr. Mitchell, who is loaned by the City to work with the Mecro campaign and United Way. Specifically, Mr. Lozano is concerned because Mr. Robinson spends significant amounts of City time conducting union business while being compensated by the City. Similarly, Mr. Mitchell is on full time loan to United Way while receiving his regular City salary and benefits.

### ANALYSIS

Authorization for Mr. Robinson's salary is statutorily provided. The Meyers-Milias-Brown Act ("MMBA"), Government Code sections 3500 et seq., which governs public sector employer-employee relations in California, has provisions for compensable time for union officials. Specifically, Government Code section 3505.3 provides: "Public agencies shall allow a reasonable number of public agency employee representatives of recognized employee organizations reasonable time off without loss of compensation or other benefits when formally meeting and conferring with representatives of the public agency on matters within the scope of representation." Additionally, 29 C.F.R. section 785.42 provides in pertinent part: "Time spent in adjusting grievances between an employer and employees during the time the employees are required to be on the premises is hours worked . . . ."

Mr. Robinson conducts virtually all the meet and confer and grievance resolution business for Local 127, therefore, no other Local 127 members routinely require time off for union activity. As Mr. Robinson conducts most of Local 127's business, he does

spend large blocks of time engaged in union activities. However, pursuant to City policies and procedures, Mr. Robinson submits completed time cards indicating when he has been performing approved on site union business. He also provides information regarding the nature of the business he is conducting. Finally, Mr. Robinson reports to his regularly assigned City position when not engaged in approved union activities. Mr. Robinson's union activities have been confirmed by investigations conducted by the City and have been found to be within the parameters of the MMBA. Mr. Robinson's union activities are therefore compensable under the provisions of Government Code section 3505.3.

Mr. Mitchell's situation is significantly different from that of Mr. Robinson. Mr. Mitchell is a City employee serving the City's interests through temporary loan of his services to the United Way. Therefore, his situation is not covered by the MMBA. The loan of an employee's services to a charitable organization, such as United Way, is within the power of the legislative body to approve without violating the strictures of the California Constitution, Article XVI, section 6 (formerly Article XIII, section 25), which prohibits gifts of public funds. The courts have indicated that:

The rule is well established, however, that if a public purpose is served by the expenditure of public funds, article XIII, section 25, is not violated even though there may be incidental benefits to private persons. It has also been held that the determination of what constitutes a public purpose is primarily a matter for the Legislature, and its discretion will not be disturbed by the courts so long as that determination has a reasonable basis.

Board of Supervisors v. Dolan, 45 Cal. App. 3d 237, 243 (1975) citations omitted.

The question which must be addressed is, what is an appropriate municipal affair or public purpose?

A good test to apply to the question here is set forth in the following from Bank v. Bell, 62 Cal.App. 320, 330 ¶217 P. 538σ: "In defining a 'municipal affair' it has been said that 'the true test is that which requires that the work should

be essentially public and for the general good of all the inhabitants of the city. It must not be undertaken merely for gain or for private objects. Gain or loss may incidentally follow, but the purpose must be primarily to satisfy the need, or contribute to the convenience, of the people of the city at large. Within that sphere of action, novelty should impose no veto."

Perez v. City of San Jose, 107 Cal. App. 2d 562, 566 (1951).

The temporary loan of a City employee's services to United Way involved a determination made by the City Manager with City Council knowledge that the loan of a City employee, at City expense, to the charitable organization United Way would provide a benefit to the City and its residents which outweighs any potential benefit to a private person or organization. The public purpose is uniquely manifested through the level of social services and programs sponsored by United Way which beneficially affect the City as a whole. Such determinations, and subsequent actions based upon those determinations, on the part of the City are neither unique nor unusual. The City has recognized the usefulness of such expenditures in San Diego City Charter section 93, which provides in pertinent part: "The credit of the City shall not be given or loaned to or in aid of any individual association or corporation; except that suitable provision may be made for the aid and support of the poor." As an example, the City sponsors homeless shelters during the winter months and provides medical and dental services for the homeless. Similarly, expending public monies on redevelopment has been found to be a public purpose. Board of Supervisors v. Dolan, 45 Cal. App. 3d 237, 245 (1975). Both these activities benefit private individuals. There is, nevertheless, an overall benefit to residents of the City which acknowledges the public purpose behind such actions.

The loan of Mr. Mitchell's services does not therefore violate the prohibition against gifts of public funds. However, in researching the status of Mr. Mitchell, this office has been unable to locate a formal document adopting a legislative finding of a public purpose. Similarly, we cannot find a standard agreement defining the contractual nature of Mr. Mitchell's status and no delineation of the consideration offered as

inducement for the contract. The courts "recognize that any claim of an unlawful gift of public funds is refuted if the consideration given is adequate so as to evidence a bona fide contract." *Kizziah v. Department of Transportation*, 121 Cal. App. 3d 11, 23 (1981).

The courts further indicate that: "The benefit to the state from an expenditure for a 'public purpose' is in the nature of consideration and the funds expended are therefore not a gift even though private persons are benefited therefrom." *Id.* at 22.

We suggest, therefore, that a contract between the City and United Way be drafted reflecting the terms and conditions of the agreement and indicating the public purpose behind the agreement. We further suggest the matter be brought to City Council for a legislative finding of a public purpose through a resolution.

#### CONCLUSION

Both Mr. Robinson's and Mr. Mitchell's activities are authorized by law if proper procedures are followed. Mr. Robinson's activities are properly documented and fall within the guidelines of the MMBA. We would be happy to work with you to prepare a resolution for City Council which will correct any deficiencies in the loan of Mr. Mitchell's services to United Way. In the future, we recommend the resolution go to City Council before the services are provided.

If you have further questions, please contact me.

JOHN W. WITT, City Attorney

By

Sharon A. Marshall

Deputy City Attorney

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cc Joe Lozano

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